

Ocenar (Migration) [2017] AATA 2307 (8 November 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Rose Ann Duco Ocenar
CASE NUMBER:	1611264
DIBP REFERENCE(S):	BCC2015/1378918
MEMBER:	David Barker
DATE:	8 November 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations • r.2.03A

Statement made on 08 November 2017 at 4:16pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Genuine de facto relationship – Shared finances – Consistent cohabitation – Representation of relationship – Parties married after application – Length of relationship – Conflicting evidence in visa application – Timing of relationship commencement

LEGISLATION

Migration Act 1958, ss 5CB, 5F, 65

Migration Regulations 1994, r 1.09A, r 2.03, r 2.03A, Schedule 2, cl 820.211, cl 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 22 July 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 13 May 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because they were not satisfied the evidence established the applicant was the spouse or de facto partner of the sponsor.
4. The applicant appeared before the Tribunal on 8 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and Mr Wayne Harris.
5. The applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. BACKGROUND

8. The applicant is a national of the Philippines and is 26 years old.
9. The sponsor was born in the United Kingdom and subsequently came to Australia in 1967. He became an Australian citizen in 2004. He is 55 years old.
10. The visa application forms state the parties met in the Philippines on 14 December 2011 and commenced a de facto relationship with each other on 26 August 2014. The parties were married in Darwin on 18 March 2017.
11. The delegate's decision record, a copy of which was provided with the review application, indicates the applicant first arrived in Australia on a Visitor visa on 4 April 2012 and returned to Australia on a number of occasions since that time on further Visitor visas, up until the time she applied for the Partner visa in May 2015.
12. Prior to the hearing the applicant provided information to the Tribunal including but not limited to the following: written statements from the applicant and the sponsor, financial records, photographs and witness support statements.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the applicant and her sponsoring partner were in a genuine spousal or de facto relationship at the time of application and at the time of this decision.

14. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files and oral evidence provided by the applicant, sponsor and witness at the hearing. The Tribunal has the benefit of considerably more evidence than was available to the Department at the time of the delegate's decision.
15. The parties' oral evidence regarding the circumstances in which they met, the development of their relationship and their current living circumstances was consistent and credible. Their oral evidence during the hearing was also consistent with the very extensive documentary evidence provided with the review application. The Tribunal found the parties and Mr Wayne Harris to be credible witnesses who gave their evidence in a calm, rational manner without embellishment.
16. The applicant told the Tribunal the parties did not have the assistance of a migration agent when they applied for the Partner visa and had limited understanding of the visa application process. She said the sponsor mostly filled out the form and he made some inadvertent minor mistakes when he filled out the form. In light of the cumulative evidence that is now available, I find the applicant's claim about this issue to be both plausible and reasonable.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

17. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the applicant claimed they were at the time of application the de facto partner of the sponsor who is an Australian citizen. The applicant claims she is now, at the time of this decision, the spouse of the sponsor.

WERE THE PARTIES IN A DE FACTO RELATIONSHIP AT THE TIME OF APPLICATION?

18. As the parties were not married to each other, at the time of application, under a marriage that is valid for the purposes of the Act, they could not, at the time of application, satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
19. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
20. The Tribunal has reviewed the considerable amount of bank and other financial records, witness support statements, photographs and the oral and written evidence provided by the applicant and sponsor. On the basis of this evidence and in relation to the parties' relationship the Tribunal makes the following findings:
 - The parties were at the time of application and at the present time sharing regular expenses, pooling their finances and generally structuring their financial affairs in a manner which is indicative of two people in a genuine and continuing relationship;
 - The parties have not lived separately and apart on a permanent basis since April 2012 and from that time have spent regular periods residing together at Links Road,

Marrara, Darwin in the Northern Territory whilst the applicant was visiting Australia as a lawful non-citizen;

- They parties have resided together at Links Road, Marrara, Darwin in the Northern Territory on an ongoing basis since April 2014.
- The parties share domestic tasks and run their household in a manner which is indicative of a couple in a genuine and continuing relationship;
- The parties were, at the time of application and at the present time, representing themselves to family, friends and their local community in Darwin as a couple. The parties maintain regular communication with and have the support of their respective families for their relationship. The parties plan and undertake joint activities through the Darwin Golf Club and other social networks they are linked with;
- The Tribunal finds that the applicant and her sponsor have been in a committed relationship since in or around March 2013.
- The parties married in Darwin on 18 March 2017;
- The Tribunal is satisfied the parties see their relationship as stable, mutually supportive and long-term. The Tribunal considers the parties' evidence with regard to their commitment to each other to be plausible, persuasive and sincere.
- The extent to which the parties support each other and are committed to the welfare of each other provides significant weight in support of a finding that they are in a genuine and continuing spousal relationship.

21. Conclusion on spouse and de facto criteria

22. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that the relationship between them is genuine and continuing. The Tribunal finds the parties live together and have not lived separately and apart on a permanent basis since in or around April 2012. The parties are not related by family.
23. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of the application and is satisfied that the requirements of s.5F are met at the time of the decision.
24. The parties are both over the age of 18 years and therefore the criteria in cl.820.211(2)(c) is satisfied. At the time of application, the applicant held a substantive visa and so the criteria in cl.820.211(2)(d) is not relevant.
25. The Tribunal further finds that at the time of this decision the applicant is the sponsor's spouse, and therefore continues to meet the requirements of cl.820.211(2).
26. Therefore, the applicant meets cl.820.211 and cl.820.221.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

27. Persons lodging an application for a partner visa on the basis of being in a de facto relationship must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date

of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).

28. The Tribunal accepts that the parties are committed to each other and to their marriage, which took place in Darwin on 18 March 2017. The exception to the requirement that the parties had been living together for at least the period of 12 months ending immediately before the date of the application by having their relationship registered is an exception created by the legislation. The legislation does not provide that the exception exists if the parties then marry. A valid marriage does not, in and of itself satisfy the requirement the de facto relationship be registered under a relevant State or Territory law. The Tribunal notes the registration of relationships is not an option that is available to couples who reside in the Northern Territory.
29. The parties' claim they commenced they have been in a de facto relationship, to the exclusion of other people, since in or around March 2013. This is contrary to a response to a question in the visa application, which indicates they commenced a defacto relationship in August 2014. However, the claim they commenced a de facto relationship at a significantly earlier time is supported by a number of the witness declarations, including those provided by: Robert Hosking, Wayne Harris, Jeffrey Heap, Robert Elix, Joanne Schmidt, Aire Phommachanth and Marilou Lehmann. During the hearing, Mr Harris attested to the genuine nature of the parties' relationship and that they had been demonstrably in a committed relationship in the eyes of their many friends in Darwin since at least mid-2013. The Tribunal found the oral evidence of Mr Harris with respect to this and related issues to be quite persuasive and has attached significant weight to it. It is also apparent the sponsor was providing the applicant with consistent assistance, both financially and upon a practical level, to visit him in Darwin for regular, extended periods of time since 2012. On the basis of this cumulative evidence, the Tribunal accepts the parties were in a de facto relationship from in or around March 2013. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application. The Tribunal is also satisfied both parties are over the age of 18 years.
30. For these reasons, the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
31. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

32. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2)(a) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A

33.

David Barker
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).